IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 829 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

JOSHI AMRUTLAL NARANJI

Appearance:

1. Criminal Appeal No. 829 of 1990
MR B.D.DESAI, APP for Appellant-State
MR A.M.DAGLI for MR MJ DAGLI for Respondent

CORAM : MR.JUSTICE A.M.KAPADIA

and

MR.JUSTICE H.H.MEHTA

Date of decision: 13/03/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE A.M.KAPADIA)

The respondent ('the accused' for short) was tried by the learned Additional Sessions Judge, Jamnagar in Special Criminal Case No. 18 of 1990 for commission of the alleged offence under Sections 17 and 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('the NDPS Act' for short).

2. At the end of the trial he was not found guilty of the offence with which he was charged. Resultantly he was acquitted vide judgement and order dated June 20, 1990 recorded in Sessions Case No. 18 of 1990, which has given rise to the present appeal at the instance of the appellant-State of Gujarat.

3. As per the prosecution case, on December 4, 1989 at 7:00 AM, PW-7 Rakesh Kumar Sridayal Sharma, P.S.I. of Jodia Police Station along with other police personnel was on duty at the outskirts of Bhadar village in connection with the prohibition raid. At that time he received information through Police Constable Vashrambhai that Joshi Maharaj Amrutlal Naranji (accused) of Pithar village is keeping opium with him and selling the same, he, therefore, called two panchas, prepared preliminary panchnama and thereafter along with panchas and police personnel went to Pithar village in a police Jeep. Jeep was parked at the outskirts of the village. From there they went to the house of the accused on foot. The accused was found in his house and in the presence of the panchas 'person' of the accused was searched. During the said search one plastic bag was found from the right hand pocket of his trouser. From the said plastic bag opium was found, for which, accused has no pass, permit or licence. Thereafter Babubhai Tribhuvan, Goldsmith was summoned to weigh the opium which was found to be 44 gms. Thereafter, necessary formalities with regard to seizure and sealing was done in the presence of the panchas, and accordingly, panchnama was completed and the accused was arrested. In connection with the aforesaid incident, PW-7 Rakesh Kumar Sridayal Sharma filed a complaint in Jodia Police Station. Pursuant to the said complaint, an offence was registered and investigation was put into motion. During the course of the investigation, he recorded statements of the Police Personnel and others.

Recovered muddamal article was sent to FSL, Junagadh for analysis through Writer Head. On analysis, FSL certified the said muddamal as opium. As the evidence was divulged against the accused, chargesheet was filed against the accused for commission of the offence under the NDPS Act in the Court of learned JMFC, Jodia.

4. On committal, the learned Additional Sessions Judge framed charge against the accused for commission of the offence under Section 17 of the NDPS Act. He pleaded not guilty to the same and claimed to be tried. Thereupon he was put to trial in Sessions Case No. 18 of 1990.

5. To prove the culpability of the accused the prosecution has examined all eight witnesses and also produced documents upon which heavy reliance was placed.

6. On appreciation, evaluation and analysis of the evidence on record, the learned trial Judge came to the conclusion that the prosecution has failed to establish the charge levelled against the accused as the panchas have not supported the prosecution case and the investigating officer has not observed/complied with the statutory provisions contained in Sections 42, 50 and 57 of the NDPS Act. Resultantly, he acquitted the accused of the offence with which he was charged.

7. We have heard Mr. B.D.Desai, learned APP for the appellant-State of Gujarat and Mr. A.M.Dagli, learned advocate for the accused. We have also perused the memo of appeal, the impugned judgement and order, testimonial collections, and the record and proceedings of the Sessions Case No. 18 of 1990 which have been called for from the Sessions Court while admitting the appeal.

8. To prove the charge levelled against the accused, prosecution mainly relied upon the oral testimony of the two panchas namely, PW-3 Hasan Usman and PW-4 Ashok Kumar Babulal Chauhan at Exhibits 13 and 15 respectively. They have not supported the prosecution case, and therefore, they were declared hostile. During the cross-examination nothing substantial was found against the accused.

9. Thereafter PW-7 Rakeshkumar Sridayal Sharma, P.S.I. of Jodia Police Station was examined at Exhibit-19. In his oral testimony he has narrated the entire story as per the prosecution case and the complaint Exhibit-20. Admittedly, he is an officer under Section 42 of the NDPS Act. It is true that he has received information while he was on duty at the

outskirts of Bhadar village in connection with the prohibition raid. However, in view of Sub-Clause 2 of Section 42 of the NDPS Act he was supposed to send a copy of the information to his immediate official superior. He has admitted that he has not sent the information to his immediate superior. It is true that he has recorded the said information in his panchnama, however, he was supposed to send the said information to his immediate superior forthwith. He has failed in discharging his statutory duty contained under Section 42 of the NDPS Act, which is a fatal to the prosecution case. (See State of Punjab Vs. Balbir Singh (1994) 3 SCC 299).

10. The another infirmity which we have noticed is that PW-7 Rakeshkumar Sridayal Sharma has not observed or complied with the statutory provisions contained under Section 50 of the NDPS Act. As per the requirement of the said Section if 'person' of the accused is required to be searched it was obligatory upon the officer to inform the accused about the existence of his right to be searched in presence of a gazetted officer or a Magistrate, and thereafter, as per the desire of the accused he has to carry out the search of 'person' of the accused. In the instant case, admittedly, such option was not given by PW-7 Rakeshkumar Sridayal Sharma to the accused. It is settled principle of law by catena of decisions that non-observance or non-compliance of statutory provisions contained under Section 50 is a fatal to the prosecution case. (See State of Punjab Vs. Baldev Singh (1999) 6 SCC 172).

11. Lastly, non-observance of provisions of Section 57 of the NDPS Act raises serious doubt on the prosecution case. It is true that the requirement of Section 57 of the NDPS Act is not mandatory but directory. As per Section 57 of the NDPS Act, the investigating officer has to make full report of all particulars, next after arrest or seizure within 48 hours to his immediate official superior. In the instant case, admittedly, the said requirement contained under Section 57 of the NDPS Act has not been complied with though the requirement of Section 57 of the NDPS Act are directory. In the absence of supporting or corroborative evidence and non-observance and non-compliance of statutory provisions of Sections 42 and 50 of the NDPS Act, and non-compliance of Section 57 would vitiate the trial.

12. In this connection, it would be appropriate to refer to the judgement of the Supreme Court in the case of GURBAX SINGH V. STATE OF HARYANA, AIR 2001 SC 1002. In the said case, Supreme Court has said that the failure

of investigating officer to make full report of all particulars, next after arrest or seizure within 48 hours thereof to his immediate official superior as provided under Section 57 of the Act and where the conduct of panch witnesses was unusual as he offered himself to be a witness for search and seizure and contradiction as to nature of seal used by the investigating officer, conviction under the circumstances was not proper.

13. Applying the principles laid down by the Supreme Court in above referred to judgement to the facts of the present case, at the risk of repetition be it stated that since the panch witnesses have not supported the prosecution case and investigating officer has not complied with the statutory requirement contained under Sections 42 and 50 of the Act, noncompliance of Section 57 of the NDPS Act raises a serious doubt on the prosecution case, and therefore, prosecution is unable to prove the charge levelled against the accused.

14. In view of the aforesaid state of affairs and having regard to the unsatisfactory nature of evidence led by the prosecution witness which we have referred to in earlier paragraph of the judgement, it cannot be said that the learned trial Judge has committed any error in acquitting the accused of the offence with which he was charged. We are in complete agreement with the finding, ultimate conclusion and resultant order of acquittal recorded by the learned trial Judge, as in our view, no other conclusion is possible except the one reached by the learned Judge.

15. It is a cardinal principle of criminal jurisprudence that in an acquittal appeal if other view is possible then also appellate Court cannot substitute its own view by reversing the acquittal into conviction, unless the findings of the trial Court are perverse, contrary to the material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable. (See Ramesh Babulal Doshi V. State of Gujarat (1996) 9 SCC 225). In the instant case, the learned APP has not been able to point out to us as to how the findings recorded by the learned Trial Court are perverse, contrary to material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable.

16. In the case of RAM KUMAR V. STATE OF HARYANA, AIR 1995 SC 280, Supreme Court has held that "powers of the High Court in an appeal from order of acquittal to reassess the evidence and reach its own conclusions under Sections 378 and 379, Cr.P.C. are as extensive as in any

appeal against the order of conviction. But as a rule of prudence, it is desirable that the High Court should give proper weight and consideration to the view of the Trial Court with regard to the credibility of the witness, the presumption of innocence in favour of the accused, the right of the accused to the benefit of any doubt and the slowness of appellate Court in justifying a finding of fact arrived at by a Judge who had the advantage of seeing the witness. It is settled law that if the main grounds on which the lower Court has based its order acquitting the accused are reasonable and plausible, and the same cannot entirely and effectively be dislodged or demolished, the High Court should not disturb the order of acquittal."

17. It may be noted that this is an acquittal appeal in which Court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly, when the evidence has not inspired confidence of the learned trial Judge. As this Court is in general agreement with the view expressed by the learned trial Judge, it is not necessary for this Court either to reiterate the evidence of the prosecution witnesses or to restate reasons given by the learned trial Judge for acquittal, and in our view, expression of general agreement with the view taken by the learned trial Judge would be sufficient in the facts of the present case for not interfering with the judgement of the learned trial Judge, and this is so, in view of the decisions rendered by the Hon'ble Supreme Court in the case of GIRJA NANDINI DEVI AND OTHERS V. BIJENDRA NARAIN CHAUDHARI, AIR 1967 SC 1124 and STATE OF KARNATAKA V. HEMA REDDY AND ANOTHER, AIR 1981 SC 1417.

18. On overall appreciation of evidence, this Court is satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the respondent. Suffice it to say that the learned Judge has given cogent and convincing reasons for acquitting the respondent and the learned A.P.P. has failed to dislodge the reasons given by the learned trial Judge and convince this Court to take a view contrary to the one taken by the learned trial Judge.

19. Seen in the above context, as this appeal lacks merit, deserves to be dismissed by confirming the judgement and order of acquittal which is impugned under Appeal.

20. For the foregoing reasons, Appeal fails and accordingly it is dismissed.

(A.M.Kapadia,J)

(H.H.Mehta,J)

Jayanti